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RE ANN JOO STEEL BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[PETITION NO: D8-26-92-2008]
B 4 DECEMBER 2008

COMPANY LAW: *Shares - Capital reduction - Petition for reduction of capital held by minority shareholders - Whether could reduce capital on selective basis - Companies Act 1965, s. 64*

C The petitioner company in this case had sought to reduce its paid-up capital under s. 64 of the Companies Act 1965 by cancelling the ordinary shares held by the minority shareholders and using the entire credit thereof to repay in cash the shareholders concerned. Before the learned judge, the primary D question that arose was whether it is permissible for the company to reduce capital selectively by returning only the capital of its minority shareholders. It was not disputed that the capital of the affected minority shareholders constituted only 1.81% of the total shareholding and that only some 15% of them attended to vote in E favour of the resolution.

Held (allowing petition):

(1) A company may reduce its share in many different ways and F can do so by cancelling only some of the shares in a class (*Re Hunter Resources Ltd; Nicron Resources Ltd v. Catto*). While a selective cancellation of this kind will be closely examined by the court, in this case, considering that the minority shareholders who had not attended to vote at the meeting G had been duly served with the Circular to Shareholders, and given that the value of each share had been evaluated by an independent accountant appointed by the company and the minority shareholders present at the EGM had not deemed it fit to query the evaluation, this court is therefore bound to allow the application. H

Case(s) referred to:
Nicron Resources Ltd v. Catto 8 ACSR 219 (1992) ***(refd)***
Re Beaufort Sentosa Development Pte Ltd [2001] 4 SLR 237 ***(refd)***
Re Hunter Resources Ltd [1992] 7 ACSR 436 ***(refd)***

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Legislation referred to:
Capital Markets and Services Act 2007, s. 212(2)
Companies Act 1965, s. 64(2)

For the petitioner - Sally Kee Seok Meng; M/s Wong Beh & Toh

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Kang Hwee Gee J:

[1] This is a petition to reduce the company's paid up capital reduction pursuant to s. 64 of the Companies Act 1965.

[2] The petitioner was formerly listed in Bursa Malaysia Securities Berhad and was de-listed with effect from 9am on Tuesday 26 June 2007 following two voluntary general offers which were carried out in 2005 and 2007 respectively by their major shareholder, Ann Joo Resources Berhad resulting in Ann Joo Resources Berhad holding 197,735,238 shares of the petitioner constituting 98.19% of the total shareholding of 201,378,901 ordinary shares leaving a balance of only 3,643,663 shares in the hands of third party constituting only 1.81%.

[3] Ann Joo Resources Berhad made a request to the petitioner to implement a selective capital reduction exercise to be carried out by the petitioner to cancel the remaining 1.81% of the total shares of the petitioner not currently held by Ann Joo Resources Berhad following which an EGM was convened on 24 September 2008 whereby it was resolved as follows:

FORM 11

Companies Act, 1965
Company No. 4405-M

Notice Of Resolution
Ann Joo Steel Berhad

To the Registrar of Companies,

At a general meeting of the members of ANN JOO STEEL BERHAD duly convened and held at Dewan Putra Perdana 1, Putrajaya Shangri-La, Taman Putra Perdana, Presint 1, 62000

Putrajaya, Wilayah Persekutuan Putrajaya on the 24th day of September 2008, the special resolution set out below was duly passed:

Special Resolution

Proposed Selective Capital Repayment Pursuant To Section 64 Of The Companies Act 1965

THAT, subject to the approvals of all relevant authorities and/or relevant parties being obtained including the confirmation by the High Court of Malaya pursuant to Section 64 of the Companies Act, 1965 for the proposed selective capital repayment scheme of AJS ("Proposed SCR"), approval be and is hereby given for AJS pursuant to Article 50 of its Articles of Association, to effect a capital reduction by:

(i) the cancellation of 3,643,663 ordinary shares of RM1.00 each in AJS ("AJS Shares") representing all the AJS Shares held by the shareholders of AJS other than Ann Joo Resources Berhad ("AJR") ("Other Shareholders") at a date to be determined later by the Board of Directors of AJS ("Entitlement Date/Books Closure Date"), resulting in the paid-up capital of AJS being reduced from RM201,378,901 represented by 201,378,901 AJS Shares to RM197,735,238 represented by 197,735,238 AJS Shares;

(ii) applying the entire credit of RM14,064,539 arising from the cancellation of AJS Shares in paragraph (i) above in repaying in cash to all the Other Shareholders, the sum of RM3.86 ("Cash Repayment") for each AJS Share held on the Entitlement Date/Books Closure Date, SUBJECT to an adjustment if AJS declares or pays any dividend on or after 28 August 2008 but prior to the Entitlement Date/Books Closure Date, the Cash Repayment shall be reduced by such quantum of gross dividend per AJS Share declared or paid;

AND THAT the Board of Directors of AJS be and is hereby authorized with full powers to take all such steps as it may deem necessary to give effect to the Proposed SCR including to:

(a) determine the Entitlement Date/Books Closure Date;

(b) assent to any condition, stipulation, modification, variation and/or amendment as may be imposed by the relevant authorities and/or by the High Court of Malaya;

(c) lodge an office copy of the order of the High Court of Malaya referred to in this Special Resolution with the Registrar of Companies on such date as the Directors may determine;

(d) do all such acts, deeds and/or things and execute, sign and deliver all documents for and on behalf of AJS as may be required or as they may consider necessary or expedient in the best interest of AJS, to give full effect to and complete the Proposed SCR.

Dated this 25th day of September, 2008

Sgd.

...

Director

Dato' Lim Hong Thye

Lodged by: Epsilon Advisory Services Sdn Bhd (627159-V)
Address: 312, 3rd Floor, Block C, Kelana Square
17 Jalan SS 7/26, 47301 Petaling Jaya
Selangor Darul Ehsan
Tel: 03-7803 1126 Fax: 03-7806 1387

Miss Sally Kee Seok Meng For The Petitioner

[4] The proposed exercise does not require the approval of the Securities Commission as it does not fall within the ambit of s. 212(2) of the Capital Markets and Services Act 2007.

[5] We are asking this Court to dispense with creditors' enquiry under s. 64(2) of the Companies Act 1965 as in this case the creditors themselves have given their consent and the only six creditors (all the financial institutions), (other than trade and sundry creditors) of the petitioner had no objection to this application as per the exh. "LHT5".

[6] See Singapore case of *Re Beaufort Sentosa Development Pte Ltd* [2001] 4 SLR 237 where the High Court in granting an application for a share capital reduction states this:

> ... all relevant parties in the present case save the trade creditors support the application for capital reduction in the manner proposed. The weight of the authorities in the UK as well as in Australia seem to lean in favour of recognising the right of the company to reduce its share capital by extinguishment of preferred shares provided, of course, that the creditors are not prejudiced.

> ... I accept the capital reduction by cancellation of preferred shares as a commercially expedient method of managing a company's capital and debt.

[7] We are also seeking a dispensation of advertisement as required under the same section as the only parties that would be affected by this exercise are the petitioner, the major shareholder Ann Joo Resources Berhad, all the minority shareholders who attended or had the opportunity to attend the EGM and the creditors.

[8] We are also seeking to treat this hearing as a full hearing as there is now no necessity to return to the court given that all the parties involved have no objection to this petition save that at the EGM not every minority shareholder attended to vote. However, due notice by circular dated 2 September 2008 had been sent out to all the shareholders of the EGM to inform them of the proposed reduction.

[9] Court: Is it permissible to reduce capital selectively by returning only the capital of the minority shareholders?

Miss Sally Kee Seok Meng: It is permissible for a company to reduce its capital on a selective basis by canceling the shares of some members and not of others with the effect of expelling them from the company and that there is no requirement that a reduction of capital must affect all shareholders in the same way. See *Nicron Resources Ltd v. Catto* 8 ACSR 219 (1992) per Bryson J of the New South Wales Supreme Court:

> It has been well established by judicial authority for about a century that a company has power to reduce its capital by cancelling the shares of some members and not of others with the effect of expelling them, and that there is no requirement that a reduction of capital must affect all shareholders in the same way. Of course, this cannot happen unless it happens in accordance with the articles of association, which establish the terms of the legal relationship under which the members associate with each other; and it cannot happen without the protection prescribed by s. 195(5) and a discretionary decision by the court to confirm the reduction.

[10] Court: Is there a proper valuation of how much each share is now worth?

Miss Sally Kee Seok Meng: We are not returning the capital at par. We are returning at RM3.86 per share. In the opinion of an independent accountant appointed by the petitioner, the cash repayment of RM3.86 in the selective capital repayment which represents a premium of 5% over the net assets per share based on the audited consolidated financial statements of the petitioner's group as at 31 December 2007 is fair and reasonable. The votes that were counted and verified by the scrutineers were 550,514 votes in favour of the resolution and none of the members present voted against the resolution. The minority shareholders whose capitals are to be returned constitute only 1.81% of the total shareholding of the company and of this only 15% attended to vote in favour of the resolution. All the minority shareholders had been served with the Circular to Shareholders.

Decision

[11] The following passage of Lockhart J of the Federal Court of Australia in *Re Hunter Resources Ltd* [1992] 7 ACSR 436 at 440 and approved by Bryson J in *Nicron Resources Ltd v. Catto, supra,* should provide a persuasive precedent that there can be a return of capital on a selective basis provided all the resolutions to do so are carried out in a properly constituted EGM:

> A company may reduce its share capital in many different ways. A perusal of *Stiebel's Company Law and Precedents,* 2nd ed, (1920) at 737 to 747 and 782 to 796; and *Palmers Company Precedents,* 17th ed (1956) at 993 to 1063; also 16th ed, at 981-3 confirms this. Leaving aside listing rules of stock exchanges, a company can reduce its capital by cancelling only some of the shares in a class: *Re Nixon's Navigation Co* [1897] 1 Ch 872; *Re Thomas De La Rue & Co Ltd and Reduced* [1911] 2 Ch 361; and *Re Elders IXL Ltd* [1984] 9 ACLR 280. Nixon and Thomas establish that, in a scheme for the reduction of share capital, a company may differentiate between the holders of the same class of shares at least to the extent of paying off some and not paying off others, and that it is open to a company desiring to reduce its share capital to borrow sufficient moneys to pay off the capital represented by the shares by which the capital is to be reduced even if the advance to the company of the moneys to be used in redemption of the share capital is made by the very persons whose shares are to be redeemed (see *Thomas* at 365). A selective cancellation of shares of this kind will, however, be closely examined by the court, which will take particular care to ensure that it is not unfair to shareholders in the class who do not consent to the reduction.

[12] As the minority shareholders who had not attended to vote at the meeting had been duly served with the Circular to Shareholders and given that the value of each share had been evaluated by an independent accountant appointed by the company and the minority shareholders present at the EGM had not deemed it fit to query the evaluation, I am therefore bound to allow this application.

[13] There shall be an order in terms of this petition. In addition there shall be an order that the minutes detailing this reduction of capital as set forth in para 27 of the petition be approved.